IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

S.B. CIVIL FIRST APPEAL NO.296/03

Sukhdev Singh Vs. Baxis Singh & Anr.

Against judgment and decree dated 27.08.2003 passed by Addl. District Judge No.1, Hanumangarh in Civil Suit No. 114/2002 (22/1999) (47/1998) –Baxis Singh Vs.Mst. Gurdev Kaur & Anr.

DATE OF JUDGMENT :: 24th January,2006.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. N.S. Acharya for appellant.
Mr. S.L. Jain for respondent.

BY THE COURT:

This first appeal under Sec.96 CPC has been filed against the judgment and decree dated 27.08.2003 passed by learned Addl. District Judge No.1, Hanumangarh, in Civil Suit No. 114/2002 (22/1999) (47/1998) – Baxis Singh Vs. Mst. Gurdev Kaur & Anr., whereby the suit

against defendant No.1 was decreed with cost and it was ordered that the defendant No.1 shall get the sale-deed in respect of the disputed land written and executed at the expenses of the plaintiff and shall get it registered before the competent officer within a period of two months from the date of the order. It was further ordered that on defendant No.1's failing to do so within the specified period the plaintiff shall have the right to get the sale-deed written and executed and getting it registered in his favour through the Court.

The facts of the case inter-alia stated in the suit filed by plaintiff-respondent No.1 Baxis Singh in the year 1998 against Mst. Gurdev Kaur for specific performance of the agreement dated 27.05.1996 in respect of various lands, the details of which find mention in Para No.2 of the plaint, are to the effect that defendant in whose name the agricultural lands in various kilas of Chak

17 LLW, Tehsil Hanumangarh are entered in the revenue records, is an old aged lady suffering from ailment and is unable to lookafter the same so she has executed a General Power of Attorney in favour of her nephew Baggasingh s/o Chandsingh to do all such acts on her behalf in respect of transfer, mortgage, giving it on contract etc, which was attested and verified in the office of Sub Registrar, Ganganagar on 30.04.1993. It is further stated in the plaint that the defendant was in need of money, so she through her Power of Attorney Bagga Singh agreed to sell the aforesaid lands which was 24 Bigha & 13 Biswas @Rs.16,400 per bigha to the plaintiff, the possession of which alongwith canal water turn was already with the plaintiff, for a total sum of Rs.4,02,000 and she received Rs.60,000/- on 30.12.1993 and Rs.2,90,000 on 05.02.1994 and the balance amount of Rs.52,000/- has been paid to the defendant on the date of execution of the agreement for sale and there remains nothing due in respect of the agricultural lands. The

deed written and attested by the Notary Public was handed over to the plaintiff. It is further stated that the plaintiff is an agriculturist, who is in possession of the land continuously and the Girdawari Nahari (Sudhakar) is in his name and he is making payment of it. The condition of the agreement says that on the defendant denying to get the registry done, the purchaser shall have the right to get the registry done through Court for which the defendant will be responsible for the expenses. It is also stated in the plaint that since then the plaintiff is in possession of land as Khatedar agriculturist and making payment of Lagan, Rakam & Abyana etc to the Govt. after the purchase of the land and has developed the land by spending the money. It is further stated that he was always having money for the registry and was ready and willing to perform his part of contract but the defendant was not taking steps for getting registry done as per agreement for the reason that there has been escalation in the value of

the land and further that as she has received the entire amount of the disputed land she was not interested in getting registry done on false pretexts despite asking time and again. Finally, when she was asked to get the registry done on 12.06.1998 at Jodkiya, she clearly refused to the request of the plaintiff as she was inclined to dispose of the land to some other person. It is claimed, as the defendant was not desirous to fulfill her part of contract, the plaintiff was entitled to obtain a decree for specific performance of the contract. In the alternate it was prayed that if for any reason a decree for specific performance of the agreement is not granted, a decree for the double of the amount paid by plaintiff be passed.

Sukhdev Singh, the present appellant herein, filed an application before the learned trial Court on 08.01.1999 for impleading him as party respondent in the suit inter-alia stating that the land in question is his Khatedari land

as Late Shri Buta Singh, owner of the land made a registered Will on 15.01.1979 in his favour and others and mutation thereof was attested in his name on 04.05.1979. It was also stated that the The land in question was attached in the proceedings under Sec.145 Cr.P.C. and in the final order passed holding Mst. Gurdev Kaur in possession of the land. For getting the land back, he filed a suit under Sec. 183 of the Rajasthan Tenancy Act on 28.10.1995 before the Revenue Court (S.D.O.(Revenue), Hanumangarh), which was decided in his favour on 11.03.1997 and in execution thereof physical possession of the land was handed over to him by the Tehsildar on 25.04.1997. It was further stated that against that judgment and decree dated 11.03.1997 plaintiff filed an appeal before the Revenue Appellate Authority, which was rejected on 03.11.1998. It was also stated that the plaintiff on the basis of a forged agreement has filed the suit in collusion with defendant and concealed the material facts. It was prayed that for just and proper decision of the

suit the applicant be made a party in the suit.

Plaintiff Baxis Singh emphatically denied the contents of the application moved for impleading defendant No.1 party in the suit. It was further stated that the land stands in the Khatedari of Mst. Gurdev Kaur wd/o Buta Singh Jat Sikh and she is tenant thereof. It was further stated that when the agreement was executed in favour of the plaintiff, then also the land stood entered in the Khatedari of Mst. Gurdev Kaur. It was stated that neither Sukhdev Singh had any right or interest in the land nor there existed any Will in his favour because Sukhdev Singh himself gave statement before the Court of learned ADJ, Hanumangarh Junction to the effect that no such Will was executed by Buta Singh in his favour. It was also stated that in respect of the mutation entered in the name of defendant No.2, a revision petition is already pending before the Revenue Board and stay order is continuing. The applicant, who has no concern with the disputed land, is a

stranger to the suit, therefore, his application for impleading him as party may be dismissed.

The learned trial Court vide order dated 22.07.1999 accepted the application filed by Sukhdev Singh and ordered for impleading him as defendant No.2. Thereafter, defendant No.2 on 18.08.1999 filed written statement inter-alia denying the averments made in the plaint and stated that the disputed land is not the Khatedari land of Defendant No.1 but infact it is in the Khatedari of Defendant No.2 and despite that the plaintiff knowing it fully well in conspiracy with defendant No.1 executed an illegal agreement through some General Power of Attorney and purposely not filed the Jamabandi of the disputed land. It was further stated that when defendant No.1 was not having any Khatedari rights in the disputed land then there was no authority vested neither in defendant No.1 nor the Power of Attorney holder to deal with in respect of the aforesaid land.

It was further stated that the defendant No.1 had no right to sell out the disputed land which is in the Khatedari of defendant No.2 and so far as the agreement in question dated 27.05.1996 is concerned, the same has been prepared in connivance with the said power of attorney as the agreement of the same date which was produced before the Revenue Appellate Court, Hanumangarh in the pending appeal is totally different. It was further stated that when the plaintiff is not in possession of the land in dispute, there is no question of improving the land and incurring expenditure on it. Further, it was stated that neither the so-called sale-deed is genuine nor the defendant has any right to get registry done in the name of plaintiff and further plaintiff is not entitled to get a decree for specific performance of contract on the basis of agreement in respect of defendant No2's Khatedari land. In additional submissions, defendant No.2 stated that the disputed agriculture land, which is of his Khatedari

land was mutated in his favour on 04.05.1979 in pursuance to the registered Will dated 15.01.1979 executed by late Buta Singh s/o Kapoor Singh. It was further stated that in due course of time proceedings under Sec.145 Cr.P.C. in relation to the land in question took place and in those proceedings possession was ordered in favour of defendant No.1 and against that order he being the Khatedar of the land filed a suit against defendant No.1 under Sec. 183 of the Rajasthan Tenancy Act before the Sub Divisional Officer, Hanumangarh on 28.10.1995 which was registered as Revenue Suit No.214/95 and same was decided in favour of defendant No.2 on 11.03.1997 and in execution proceedings the physical possession of the disputed land was received by him on 25.04.1997. The appeal filed against said judgment and decree dated 11.03.1997 by the plaintiff before the Revenue Appellate Authority was dismissed on 03.11.1998. It was further stated that the plaintiff unsuccessfully challenged the Will executed in

favour of defendant No.2 by way of filing suits before the Revenue and Civil Courts. It was stated that defendant No.1 is neither having any interest in the disputed land nor she is its Khatedar but after the mutation recorded in his favour on the basis of the Will she in connivance with the Revenue authorities, she being the widow of late Buta Singh, got the Mutation No. 148 dated 17.03.1994 entered in her name which was cancelled before the District Collector, Hanumangarh in Appeal No.51/94 and the mutation attested in her favour was cancelled. It was stated further that the suit was filed by the plaintiff after filing of the appeal before the Revenue Appellate Authority against the judgment and decree awarded in favour of defendant No.2 declaring him as Khatedar and ordering possession to be handed over withholding the fact that defendant No.2 was having Khatedari in the land and Jamabandi of land in question was purposely not filed but a copy of Mutation No.148 was filed, which had already been

cancelled. The plaintiff has not bonafidely filed the suit therefore is not entitled to get equitable relief from the Court. The conspiracy is evident from the two agreements dated 27.05.1996 being different; one filed before the Revenue Appellate Authority, Hanumangarh and the other filed with the plaint before the Court. It was also stated that the plaintiff anyhow is desirous to obtain a decree for specific performance of the contract on the basis of forged agreement. It was prayed that the suit be dismissed with costs.

On the basis of pleadings of parties, the learned trial Court framed issues to the effect:

> (i)Whether the land mentioned in Para No.1 of the plaint was of defendant No.1's Khatedari & possession, and was agreed to be sold through General Power of Attorney holder (on 30.04.1993 the General Power of Attorney registered) @ 16,400/- per bigha for a total sum of Rs.4,02,000. A sum of Rs.60,000 was received on 30.12.1993 and Rs.2,90,000 on 05.02.1994 towards it and after receiving balance amount of Rs.52,000 agreement was reduced

in writing and possession of the land was handed over to the plaintiff?

(ii) Whether the plaintiff was always ready and willing to get the registry done of the disputed land and is still ready but the defendant No.1 kept on making excuses and finally on 12.06.1998 clearly refused?

(iii) Whether the plaintiff as per the conditions of the agreement is entitled to specific performance of this agreement?

(iv) Whether the disputed land is the agricultural Khatedari land of defendant No.2, which was entered in his Khatedari on 04.05.1979 on the basis of Will dated 15.01.1979 executed by Buta Singh?

(v) Whether in respect of this land litigation took place between defendant No.1 and defendant No.2 under Sec.145 Cr.P.C. and Sec.183 of the Tenancy Act and the same were decided in favour of defendant No.2?

(vi) Whether the present suit has been filed by the plaintiff in connivance and conspiracy with defendant No.1 and is liable to be dismissed?

(vii) Relief?

Plaintiff in oral evidence got recorded the statements of PW1 Jagdish Rai Gupta, PW2 Jasjeet Singh, PW3 Aadram & himself as PW4. In defence, defendant No.2 Sukhdev Singh himself appeared before the Court as DW1 and producing DW2 Randheer Singh got his statement recorded. Both the parties in support of their pleas also tendered some documents in evidence.

It has been contended by the learned counsel for the appellant that the agreement to sale is not adequately stamped and registered one, therefore, it was not admissible in evidence. It has further been contended that the trial Court has decreed the suit on the basis of Ex.1, the agreement dated 27.05.1996, which is said to be executed by the Power of Attorney holder of defendant Smt. Gurdev Kaur, which is a false and fabricated document as the defendant-respondent Smt. Gurdev Kaur was not the Khatedar tenant of the land in question. Gurdev Kaur not being Khatedar tenant, neither

she herself nor her Power of Attorney holder was having any authority under law to dispose of the land, which was in the tenancy of appellant-defendant No.2. The learned counsel submitted further that it is an admitted position on record that in the present matter pertaining to the disputed agricultural land regarding which litigation took place under Sec. 145 of the Cr.P.C. and in those proceedings the possession was found of Smt. Gurdev Kuar and when a suit for possession under Sec. 183 was filed by the defendant-appellant before the Revenue Court, the same was decreed in favour of the appellant and the judgment and decree awarded in that suit is still not disturbed and is in favour of the appellant, therefore, the trial Court was not justified in decreeing the suit for specific performance of the land which was not the Khatedari land of the defendant Smt. Gurdev Kaur. The learned counsel submits that the trial Court has seriously erred while appreciating the evidence led by the parties

and deciding the issues. According to the learned counsel, a fake agreement to sale was prepared in relation to the disputed land by the plaintiff in connivance with defendant No.1 as plaintiff and defendant both knew it well that defendant No.1 was having no Khatedari rights in the land. It has been submitted that the land in question is of the appellant as on account of a registered Will the land in question came in possession of the appellant by virtue of Will dated 15.01.1979 and the land in dispute was entered in the Khatedari of defendant No.2 on the basis of the Will. The learned counsel submits that if the Will was in favour of defendant No.2 then there was no reason why on the basis of a forged document, said to be the agreement to sale, the suit was not liable to be decreed. In the last, learned counsel submitted that it was the appellant who subsequently came to know about the collusive suit filed by Baxis Singh on the basis of alleged agreement to sale, then he moved an application before the learned trial Court to

implead him as a party and the trial Court impleaded him party in the suit and he has been able to prove through various documents brought on record that the land in question came in his possession on account of a Will executed by Buta Singh, who was the owner of the land in question, and in that Will of the year 1979 some bighas of land were also given to defendant No.1 Smt. Gurdev Kaur. The learned counsel submits that though the copy of the Will has not been produced but since reference has been made of the Will in various documents and judgments delivered by various courts, therefore, in the absence of Will to allow a decree of specific performance cannot be said to be legal, just and proper. In support of his submissions, the learned counsel has placed reliance on Harish Singh & Ors. Vs. Lalu Ram [RLR 1997(1) 31], Khuraj & Anr. Vs. Moti Lal & Ors.(1998 DNJ (Raj.168), Jamna Bai Vs. Tulsi Ram (1996 DNJ Raj.717), (Kamla Shankar Vs. Rattan Lal & Ors. (1998 RRD 21), Nihal Singh Vs. Singh Ram & Ors. (1989 (1) RLR 384), Claude

Pinto Vs. M.V. Shankar Bhat & Anr [1996 (2) Civil Court Cases 609 (Karnataka)], Sitaram Tukaram Dangaval & Ors. Vs. Sumantilal Chindulal Burad & Anr.[1997 (1) Civil Court Cases 689 (Bombay)], Lourdu Mari David & Ors. Vs. Louis Chinnaya Arogiaswamy [1996 DNJ (SC) 348], Kallathil Sreedharan & Anr. Vs. Komath Pandyala Prasanna & Anr. [1996 DNJ (SC) 452] and Ganesh Shet Vs. Dr. C.S.G.K. Shetty & Ors. [1998(2) Civil Court Cases 711 (SC)].

On the other hand, the learned counsel has submitted that the land in question being in the Khatedari of defendant Gurdev Kaur and her Power of Attorney holder, who was her nephew and was having a registered General Power of Attorney of 1993 in his favour, received the consideration in relation to land in dispute, mention of which has been made in Para 2 of the plaint, on different dates and finally on 27.05.1996 when balance amount was paid, the deed was executed, therefore, the plaintiff respondent has the right to get the

decree of specific performance in his favour of the agreement to sale executed in the present matter i.e. Ex.1. Learned counsel submitted further that since after receiving the entire consideration for the disputed land when defendant No.1 Gurdev Kuar or her Power of Attorney did not take any steps for getting the registry of the land in favour of the plaintiff-respondent then the suit was filed. The trial Court, on the basis of the pleadings of the parties, framed issues and found that Sukhdev Singh appellant had no right whatsoever in the disputed land and therefore decreed the suit for specific performance of the contract for the reason that plaintiff respondent was always ready and willing to perform his part of the contract and Smt. Gurdev Kuar when failed to perform her part of contract after receiving the entire consideration, the suit was liable to be decreed. Learned counsel submits that the trial Court has recorded its finding on issues after elaborate discussion. It has been submitted further that the case of the

appellant is mainly based on Will as would appear from the written statement filed by the appellant who was subsequently made defendant No.2 in the suit on the basis of the Will. Neither the registered Will nor a copy thereof has been placed on record, therefore, the trial Court was justified in drawing adverse inference for not producing the will against Sukhdev, the appellant and the plaintiff's suit has been rightly decreed which requires no interference by this Court. It has been submitted that it is not necessary that the agreement to sale should always be a registered document. It is submitted that this document tendered in evidence requires to be examined under the provisions of Registration Act particularly in the circumstances that it was admitted in evidence without there being any objection to it. The learned counsel submits that on the basis of Ex.1 the suit has been decreed and the appeal filed therefore deserves to be dismissed. In support of his submissions, learned counsel has placed

reliance on following decisions:

(1)RLR 1984 511 – Gulam Mohammed & Anr. Vs. Mst. Mariyam & Anr.

(2)AIR 1985 Cal. 200 – Himjit Construction Vs. Tarun Sarkar

(3)RLR 1982 pg. 1021 – Girdhar Singh & Ors. Vs. Anand Singh & Ors.

(4)AIR 1990 Orissa 129 – Chandra Sekhar Das & Anr. Vs. Girdidhari Sahu & Ors.

(5)AIR 1968 SC 1083 – Mrs. Om Prabha Jain Vs. Abnash Chand & Anr.

(6)RLW 1974 Raj.296 – Durgadan Vs. Devidan

(7)RLR 2000(2) 193 – Harjeet Vs. Megha & Ors.

(8)RLW 2002(2) 802 – Narayan Vs. Madan

(9)WLC 1997 (UC) 377 – Smt. Pushpa Kanwar & Anr Vs. Suraj Prasad Gupta

(10)AIR 1961 SC 1655 – Javer Chand Vs. Pukhraj Surana

(11)AIR 1994 SC 1653 – Jattu Ram Vs. Hakam Singh & Ors.

Before proceeding further in the case, I deem it proper to discuss the authorities

cited by learned counsel for the appellant first.

RLR 1997(1) 31 (Harish Singh & Ors. Vs. Lalu Ram) – In this case, this Court considered various provisions of the Stamps Act and also the Notaries Act, 1952, and taking into consideration the rules relating to Deed Writers, found that the Notaries, Advocates and Deed writer had not performed their duties in preparing the agreement Ex.1 in accordance with law, therefore, in the facts and circumstances when it was found that proper registers were not placed and the documents entered in the register were not serially entered and the numbers etc required to be given on Ex.1 were not given, it gave a room for suspicion and as such the document was not considered to be a genuine document.

1998 DNJ (Raj.168 (Khuraj & Anr. Vs. Moti Lal & Ors.) - This was a case in which this Court while interpreting the language of the document

observed that the language of the document showed it a document purported to be an agreement to sale therefore it was liable to be marked as an exhibit at the time of recording of evidence but at the same time merely accepting a document does not dispense with its proof and the defendant can raise objection to it at any subsequent stage.

1996 DNJ Raj.717 (Jamna Bai Vs. Tulsi Ram) – In this case, this Court considered the admissibility of a document in a suit for temporary injunction. The trial Court had allowed the defendant to prove the document for collateral purposes whereas this Court held that the document was not admissible in evidence even for collateral purposes, as the same was not adequately stamped.

1998 RRD 21 (Kamla Shankar Vs. Rattan Lal & Ors.) - The Board of Revenue while considering the provisions of Tenancy Act particularly Sec. 88 and 53, in the circumstances held that when

the trial Court refused to allow the document to be tendered in evidence for the reason that it was an unregistered and unstamped family settlement in evidence and a revision petition filed was dismissed holding that the trial Court had rightly rejected the request of the plaintiff to take this document in evidence as the document was a family settlement and it creates rights in immovable property, then under Sec. 17 of the Indian Registration Act and in view of the law laid down in Kale's case, the trial Court committed no illegality in rejecting the prayer to take the document in evidence.

1989 (1) RLR 384 (Nihal Singh Vs. Singh Ram & Ors.) - This Court held that an unstamped and unregistered document required under law to be stamped and registered cannot be admitted in evidence even for collateral purposes.

Claude Pinto Vs. M.V. Shankar Bhat & Anr [1996 (2) Civil Court Cases 609 (Karnataka)]- The

Karnataka High Court finding the plaintiff not approached with clean hands held him not entitled to the equitable relief of specific performance.

Sitaram Tukaram Dangaval & Ors. Vs. Sumantilal Chindulal Burad & Anr.[1997 (1) Civil Court Cases 689 (Bombay)] – That was a case in which the Bombay Court found the property already under attachment in an earlier suit filed by plaintiff and the plaintiff filed another suit suppressing the fact of attachment. In the facts and circumstances, the Court held that specific performance cannot be granted during the pendency of attachment.

Lourdu Mari David & Ors. Vs. Louis Chinnaya Arogiaswamy [1996 DNJ (SC) 348] – The Hon'ble Apex Court observed that party seeking relief must come with clean hands and as the plaintiff came with incorrect and false facts and the respondent No.3, who had no knowledge of the plaintiff's agreement in question, the Court

refused to exercise discretion on legal principles and held the the respondent No.3 bonafide purchaser for value without notice.

Kallathil Sreedharan & Anr. Vs. Komath Pandyala Prasanna & Anr. [1996 DNJ (SC) 452] – In this matter of specific performance of contract, the Hon'ble Apex Court on the facts that the theater in question was held by by minor and his mother and therefore sale thereof to the extent of minor's share was prohibited and in those circumstances observed that decree for specific performance cannot be granted and held the plaintiff entitled to the claim of alternative relief of refund of payment asked for in the plaint which allowed by the High Court.

Ganesh Shet Vs. Dr. C.S.G.K. Shetty & Ors. [1998(2) Civil Court Cases 711 (SC)] was the case in which variance was between the contract pleaded and contract proved and the Hon'ble Supreme Court held that relief on the basis of

contract proved but not pleaded cannot be permitted as that would amount to giving effect to a contract which was not the agreement between the parties according to plaintiff. It was also held that other relief sought must also be consistent with the pleading and proof.

Now, the authorities cited on behalf of respondent.

1984 RLR 511 (Gulam Mohammed & Anr. Vs. Mst. Mariyam & Anr.) - In this case, in relation to appreciation of evidence of a witness, it has been observed that when a witness is examined in the Court and he is not cross-examined in relation to the document, which was executed in his presence, then it must be presumed that the document was executed. It has further been observed in relation to Sec.16(c) of the Specific Relief Act read with Order 8 Rule 3 & 5 of the CPC that if a party has made a specific statement to the effect that it was ready and willing to perform its part of the

contract and this statement is not controverted then it should be presumed as if it has been admitted.

AIR 1985 Cal. 200 (Himjit Construction Vs. Tarun Sarkar) – The Calcutta High Court in this case observed that when a document in possession of party is not produced then an adverse inference can be drawn against non-production of the document.

1982 RLR 1021 (Girdhar Singh & Ors. Vs. Anand Singh & Ors.) - It has been observed by this Court that evidence brought on record, which is not based on pleadings, is not required to be taken into consideration.

AIR 1990 Orissa 129 (Chandra Sekhar Das & Anr. Vs. Girdidhari Sahu & Ors.) - The Orissa High Court considering the provisions of Order 6 Rule 2 CPC observed that if a plea regarding sale for lack of permission from Govt. was not taken then subsequently this aspect was not

required to be considered by the Court.

AIR 1968 SC 1083 (Mrs. Om Prabha Jain Vs. Abnash Chand & Anr.) - Hon'ble Apex Court while considering various provisions of the Representation of the People Act in relation to the pleadings of the parties, observed that ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of the plea and when pleas so made contradicted to each other then it was not required to be looked into.

RLW 1974 Raj.296 (Durgadan Vs. Devidan) – In this case, this Court while considering the provisions of Sec.54 of the Transfer of Property Act, in relation to a document, held that the document of sale on the basis of language, which was not registered as such did not amount to sale but only a contract for sale, therefore, plaintiff was not entitled to bring the suit for specific performance.

RLR 2000(2) 193 (Harjeet Vs. Megha & Ors.) - In this case, this Court while considering the provisions of Indian Registration Act and the provisions of Transfer of Property Act, in the circumstances that there existed an agreement to sale for agricultural land alongwith possession and complete payment of sale consideration, held the document admissible in evidence.

RLW 2002(2) 802 (Narayan Vs. Madan) – In this case, the Court observed that it is true that it is the sale-deed registered and the Act which confers the right or title on the purchaser but the agreement to sale does give a right to the purchaser to compel the respondent for specific performance of the contract/agreement through the court, if the agreement to sale mentions the fact of handing over the possession, the admissibility of agreement is to be seen at the time of leading evidence but in case the agreement is unregistered, the so called purchaser party to

the agreement can use the same for collateral purposes to show the nature of possession or other like questions; even the purchaser can compel the respondent by taking appropriate steps for registration of the agreement as well.

WLC 1997 (UC) 377 (Smt. Pushpa Kanwar & Anr Vs. Suraj Prasad Gupta) – In this case, the agreement to sale was not registered one and objection was taken that it was not admissible in evidence. The Court in the circumstances found the case governed by proviso to Sec.49 of the Registration Act and held the document admissible in evidence.

AIR 1961 SC 1655 (Javer Chand Vs. Pukhraj Surana) – The Hon’ble Apex Court in the circumstances when unstamped documents Hundies were marked exhibits, observed that when earlier no objection was raised to it then subsequently it was not liable to be reviewed or revised.

AIR 1994 SC 1653 (Jattu Ram Vs. Hakam Singh) – The Hon'ble Apex Court while interpreting the provisions of the Punjab Land Revenue Act particularly Sec.31 in relation to record of rights, in peculiar facts and circumstances of the case observed that entries made by Patwari in official record are only for fiscal purposes. It was a matter in relation to exchange of land in which defect in title of the land received in exchange was revealed.

I have carefully gone through the principles laid down by the various High Courts and the Hon'ble apex Court and keeping in mind the principles laid down, now I propose to examine the present matter. The trial Court has decided Issue No.1 & 2 in favour of the plaintiff respondent holding that on account of an agreement to sale Ex.1 it has been sufficiently proved, the consideration was received and the plaintiff was always ready and willing to perform his part of contract and as

the defendant No.1 failed to perform her part of contract, as such Issue No.1 & 2 were decided in favour of the plaintiff. It was held in relation to Issue No.3 that the plaintiff was entitled for specific performance of the agreement through Court. Regarding Issue No.4, it has been held that defendant No.2 has based his claim on the basis of a Will and the will has not been produced in evidence, therefore, it cannot be presumed that defendant No.2 was having any right in relation to the suit agricultural land particularly in the circumstances that still it is not known as to whether finally the litigation between the parties have been concluded. Issue No.4, therefore, was decided against the defendant. In relation to Issue No.5, it has been decided that in the proceedings, which took place under Sec.145 Cr.P.C. the possession was found of defendant No.1 but as regards the suit under Sec. 183 of the Tenancy Act is concerned, in fact no specific finding has been recorded and issue No.5 has been decided against defendant

No.2. Issue No.6 was in relation to suit brought collusively. The finding has been recorded against the defendant and the suit has been decreed.

In the present matter, following points require consideration:

(1) Whether on the basis of Ex.1, the agreement to sale/sale-deed, the suit was liable to be decreed as Ex.1 is not adequately stamped and is also not a registered document as required under the Indian Registration Act and the Stamp Act was inadmissible in evidence?

(2) Whether any tenancy right was available to defendant No.1 or to her Power of attorney holder in relation to the agricultural land to dispose of the same by Ex.1 Agreement to Sale?

(3) Whether the alternative prayer regarding refund of consideration paid to the defendant is required to be allowed in view of doctrine of unjust enrichment?

Point No.1 & 2

Since Point No.1 & 2 are inter-related, as such same are being decided together.

It is not denied in the present case that Ex.1, a document dated 27.05.1996, is stated to be an agreement to sale/sale-deed in relation to agricultural land. The Power of Attorney holder of defendant No.1 executed this document on her behalf. This document has been tendered in evidence marking it as Ex.1. It is also not in dispute that this document is not a registered document.

A careful reading of Ex.1 leads to a conclusion that in relation to the agricultural suit land entire consideration of Rs.4,02,000/- has been received from the plaintiff by the Power of Attorney holder of defendant No.1. This document is not adequately stamped. It is also not a registered document. This says that possession of the agricultural land was handed

over to the plaintiff. Thus, it appears, this document makes a mention about complete sale of the agricultural land i.e. in all 24 bighas and 13 bishwas. This land is said to be of late Shri Buta Singh, whose wife defendant No.1 in the present case Gurdev Kaur has disposed of this land through her Power of Attorney holder Bagga Singh.

To decide the controversy, it is necessary to reproduce relevant provisions of law. Sec.17 of the Indian Registration Act is most relevant. The relevant portions whereof read as under:-

> **17. Documents of which registration is compulsory.**-(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864 or the Indian Registration Act, 1866, or the Indian Registration Act, 1871 or the Indian Registration Act, 1877,or this Act came or comes into force, namely:-
>
> (a) Xxx xxx
>
> (b) xxx xxx
>
> (c) xxx xxx

(d) xxx xxx

(e) xxx xxx

Provided …

(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the registration and Other Related laws (Amendment) Act,2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purpose of the said section 53A.

(2) Nothing in clauses (b) and (c) sub-section (1) applies to

xxx xxx xxx

xxx xxx xxx

xxx xxx xxx

Explanation.- A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

Similarly, Sec.35 of Rajasthan Stamp Law (Adaptation) Act, 1952 reads as under:

> **35. Instruments not duly stamped inadmissible in evidence, etc.**- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped.
>
> Provided that-
>
> (a) any such instrument not being an instrument chargeable with a duty not exceeding ten naye paise only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or when tent times the amount of the proper duty or deficient portion thereof exceeds five rupees, a sum of equal to ten times such duty or portion;
>
> (b) Where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in

evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamps, the contract or agreement shall be deemed to be duly stamped;

(d) Nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1895 (5 of 1898);

(e) Nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act.

In order to consider the submissions of the rival parties, it would also be relevant to consider the concerned Sec.49 of the Registration Act, 1908. Sec.49 of the Registration Act is reproduced hereinbelow:

> "49. Effect of non-registration of documents required to be registered.- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall –
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power to adopt, or
>
> (c) be received as evidence of any transaction affecting such property or conferring such power,
>
> unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

We then have the Rajasthan Stamp Law (Adaptation) (Amendment) Act, 1989 (Act No.27 of 1987), which has amended Second Schedule to Rajasthan Act No.7 of 1952. The amending provision reads as under:

> "**3. Amendment of the Second Schedule, Rajasthan Act No.7 of 1952.**- At the end of the last entry "Exemptions" in article 23 of the Second Schedule appended to the Rajasthan Stamp Law, the following shall be added, namely:-
>
> **Explanation.**- For the purpose of this article, an agreement to sell an immovable property or an irrevocable power of attorney shall, in case of transfer of the possession of such property before, at the time or after the execution of such agreement or power of attorney, be deemed to be a conveyance and the stamp duty thereon shall be chargeable accordingly.
>
> Provided that the provisions of Sec.47-A shall be applicable mutates mutandis to such agreement or power of attorney as are applicable to a conveyance:
>
> Provided further that the stamp duty already paid on such agreement or power of attorney shall, at the time of the execution of conveyance in pursuance of such agreement or power of attorney subsequently, be adjusted towards the total amount of duty chargeable on the conveyance."

In view of above provisions, it appears, in the present case, Ex.1 is a document, which ought to have been adequately stamped but it has not been stamped adequately and therefore it creates no right whatsoever

and further the document is not admissible in evidence.

In 1989(1) RLR 85 (Nihal Singh Vs. Singh Ram), this Court has observed as under:

> "The disputed document, paper No.36C/2-3 is the photo-stat copy of the original entry contained in the Bahi Khata of Phoola Ram DW3. According to it, defendants mortgaged their land with him for Rs.10,000 for making payment to the plaintiff. Admittedly the original entry is neither stamped nor registered. It is not the case of the defendant non-petitioners that it is exempted from the payment of stamp duty or registration. It is not necessary to determine the exact nature of this document. Suffice it to say here that it does require some stamp duty. Section 35, Stamp Act provides that no instrument chargeable with duty shall be admissible in evidence for any purpose. It does not say that such a instrument can be admitted in evidence for a collateral purpose. The learned counsel for the defendant non-petitioners has not been able to cite any ruling in support of his contention that a document chargeable with stamp duty and not stamped can be used for collateral purposes. The learned trial has relied upon (2) AIR 1959 Madras 764. In AIR 1959 Madras part ends at page 560. The learned trial Court has held that the portion of unstamped document

> requiring no stamp duty can be read in evidence and has relied upon (3) AIR 1959 Rajasthan 15. It may be mentioned here that question regarding the admissibility of a document for want of registration was involved in it and it was held that unregistered document can be used for collateral purpose as provided under Sec.49, Registration Act. The words "for any purpose" appearing in Sec. 35 Stamp Act were construed by the Allahabad High Court in (4) Mst. Bibo Vs. Rai Sahib Gokaran. AIR 1937 Allahabad 101, as undoubtedly implying for each and every purpose whatsoever without any exception and it matters little whether the purpose is the main purpose or a collateral one. It is thus clear that the learned trial court has acted illegally in the exercise of its jurisdiction in holding that no stamp duty is payable on the said entry of the Bahi of Phoola Ram DW3, in allowing the defendant's application paper No.B-37, and admitting the Photostat copy paper No.36C/2-3. If the order dated 28.8.87 is not set aside, the plaintiff would suffer an irreparable injury."

In the case of Jamna Bai Vs. Tulsi Ram (supra), this Court has clearly held that the document, which was required to be registered under the provisions of the Registration Act,

was not adequately stamped and registered, and therefore the document could not be received in evidence, as it was not admissible even for collateral purposes.

In AIR 1976 SC 803 (Kale & Ors. Vs. Dy. Director of Consolidation & Ors.), the Hon'ble Apex Court has held that even in the matters of family settlements where it is considered proper to reduce the settlement in writing then registration would be necessary.

In the present case, in view of the contents of Ex.1 when it says that possession was handed over to the plaintiff then the document was required to be adequately stamped, which has not been done and the document is not a registered one, therefore, it is not admissible in evidence.

Now it is further to be seen that defendant No.1 had tenancy right at the time of execution of Ex.1. The case of the plaintiff

is that he purchased the suit agricultural land from the General Power of Attorney Holder of defendant No.1 whereas the case of defendant No.2 is that the suit land had already been mutated in his favour on account of a Will executed in the year 1979. It is not denied that in the present case proceedings under Sec.145 of the Cr.P.C. also took place and in those proceedings possession was considered to be of defendant No.1. Defendant No.2, who is the appellant in this case, when came to know about the suit for specific performance, presented himself before the trial Court and moved an application under Order 1 Rule 10 CPC and in the suit, which was filed in the year 1998, he was made defendant. It is correct that he claims the property on the basis of a Will and thereafter on the basis of entries made in the revenue record. It is further case of the defendant that since the proceedings under Sec.145 of the Cr.P.C. did not determine the title or ownership in land, therefore, he filed a revenue suit under Sec.

88 and 183 of the Tenancy Act. Ex.A/9 is the Certified copy of the Revenue Suit filed on 28.10.1995 by Sukhdev Singh against Gurdev Kaur, who is defendant respondent No.1 in the present case. The revenue suit was filed by defendant No.2, who is appellant just soon after when in the proceedings under Sec. 145 Cr.P.C. the possession of the disputed land was declared of defendant Mst. Gurdev Kaur. This suit was for possession and declaration of the Khatedari rights. The Revenue Court on 11.03.1997 passed the judgment and decree in this case in favour of appellant. The Revenue Court found as under:

> " पत्रावली में उपलब्ध दस्तावेजो के अवलोकन से यह स्पष्ट हो जाता हैं कि बूटासिंह द्वारा वादी के पक्ष में 24 - 06 बीघा भूमि की दिनांक 28.2.78 को कराई गई वसीयत को सिविल न्यायालय द्वारा सही मान लिया गया हैं । प्रति वादीया द्वारा दायर सभी राजस्व वाद व सिविल वाद उसके खिलाफ निर्णित हो चुके हैं । विवादित आराजी राजस्व रिकार्ड में वादी के नाम खातेदारी भूमि दर्ज हैं । विवादित आराजी पर धारा 145 सी.आर.पी.सी. के निर्णय के आधार पर ही प्रतिवादीया का कब्जा होना पाया जाता हैं । धारा 145 सी.आर.पी.सी. में सिर्फ कब्टजा के समबन्ध में आदेश दिया जाता हैं । Title का निर्णय सिविल न्यायालय या राजस्व न्यायालय द्वारा किया जाता हैं । वादी रिकार्डेड खातेदार काश्तकार हैं अत: Title के सम्बन्ध में इस प्रकरण में कोई आदेश देने की आवश्यकता नहीं हैं । प्रतिवादिया विवादित 24 -06 बीघा भूमि पर अनाधिकृत रूप से काबिज होना पाया जाता हैं ।

अत: वाद वादी डिक्री किया जाकर विवादित आराजी वाके चक 17 LLW के प.।। /106/220 कि.न. 4-5-6-7-15 व प.नं. 107/220 के कि.न.1, 2, 7 ता 14, 17 ता 20, 22 ता 25, प. नं. 106/223 के कि.न. 21/106, व प.न. 105/123 कि.न. 25/164 कुल 6147 है भूमि से प्रतिवादिया को बेदखल करने का आदेश दिया जाता हैं । पर्चा डिक्री जारी हो ।"

A perusal of the above judgment on the basis of which decree Ex.10A was passed completely clinches the issue and makes a mention that the suit land by way of Will made by Buta Singh came in the ownership of defendant-appellant Sukhdev Singh. It is further important to refer here another document Ex.A/12, which is certified copy of an appeal filed before the learned Revenue Appellate Authority against the judgment and decree awarded on 11.03.1997 by Shri Baxis Singh, who is plaintiff-respondent in the present case. Thus, it can be gathered that the plaintiff of this case knew it very well that a suit for declaration of Khatedari rights was decreed in favour of defendant No.2 the appellant in this case. This appeal No.13/1997 titled Baxis Singh Vs. Sukhdev

Singh and Gurdev Kaur was decided on 03.11.1998. A detailed judgment has been given in this case. The Court found:

> "उक्त विवेचन से स्पष्ट हैं कि विवादित आराजी अपी. के द्वारा श्रीमती गुरदेव कौर के मुख्तयारआम से जरिये इकरारनामा दौराने अपीलाधीन वाद क्रय करने का समझौता किया गया हैं । दौराने वाद विवादित आराजी को क्रय करने सम्बन्धी इकरारनामें से कोई वैद्य अधिकार अपी. को प्राप्त नहीं हो सकते हैं । अपीलाधीन निर्णय की डिक्री से ए. आई. आर.1992 उड़ीसा पेज 47 के अनुसार अपी. भी बाध्य हो गया हैं अर्थात अपी. के दौरान वाद विवादित भूमि क्रय करने का इकरारनामा इसलिए अपीलाधीन वाद में दिये गये निर्णय व डिक्री से अपी. भी बाध्य रहेगा । अपी. को तथाकथित इकरारनामों से विवादित आराजी के सन्दर्भ में कोई वैद्य अधिकार प्राप्त नहीं होते हैं । इसलिए अपी. को यह अपील भी प्रस्तुत करने का कोई वैद्य अधिकार प्रमाणित नहीं होता हैं । जा.दी. की धारा 96 के अन्तर्गत अपी. के विद्धान् अभिभाषक द्वारा उद्वृत आर.आर.डी. 1984 पेज 45 व आर.बी.जे. 1997 पेज 446 उन्हें व्यथित पक्षकार मानने के लिए प्रस्तुत किये गये हैं, परन्तु यहां इस प्रकरण में अपी. की व्यथा उनके द्वारा रेस्पो. नं. 2 के मुख्तयारआम से विवादित आराजी के क्रय करने के किये गये इकरारनामों के आधार पर हैं । दौराने वाद दोनों इकरारनामे अपी. के हक में निष्पादित किये गये हैं । इसलिए अपी. अन्तरिती इस अपीलाधीन वाद पत्र के निर्णय से पाबन्द हैं । वाद पत्र के लम्बनकाल में हुए स्थानान्तरण के आधार पर तृतीय पक्ष अपी. अपीलाधीन निर्णय व डिक्री को चुनौती नहीं दे सकता । अपी. ऐसे निर्णय व डिक्री से पाबन्द रहेगा । तथाकथित इकरारनामे इस आधार पर विधिमान्य भी नहीं कहे जा सकते । वाद लम्बन के दौरान अन्तरिती अपी. वाद में पारित निर्णय व डिक्री से चाहे वह एकपक्षीय हो या राजीनामें पर आधारित हो से बाध्य रहेगा । इस प्रकार अपी. जिन दस्तावेजात के आधार पर आया हैं उन दस्तावेजात को विधिमान्य किसी भी प्रकार से नहीं कहा जा सकता । ऐसे गैर कानूनी दस्तावेजात के आधार पर अपी. को व्यथित पक्षकार ठहराया जाना किसी भी प्रकार से उपयुक्त व न्यायोचित नहीं हैं । अपी. को "Buyer Be Aware" के सिद्धान्त के अनुसार विवादित आराजी को क्रय करने के इकरारनामे करने से पहले राजस्व रिकार्ड

का विधिवत परीक्षण करना चाहिये था तथा श्रीमती गुरदेव कौर को इस आराजी को विक्रय करने के अधिकार हैं भी या नहीं, के बारे में भी अच्छी तरह से जांच पड़ताल करना चाहिये थी यह आराजी सन् 1972 से किसी न किसी प्रकार के विवाद में फंसी चली आ रही हैं । ऐसी स्थिति में अपी. ने विवादित आराजी को जान बूझकर के क्रय किया हैं । इसलिए अपी. अवैध दस्तावेजात के आधार पर यह अपील प्रस्तुत करने का अधिकारी प्रमाणित आर.आर.डी 1990 पेज 689 के अनुसार नहीं होता हैं । अपी. को यहां आर.बी.जे. 1997 पेज 466 का लाभ नहीं मिलेगा । उक्त विवेचन से स्पष्ट हैं कि अपी. प्रस्तुत अपील को लाने का अधिकारी प्रमाणित नहीं होता हैं । अपीलाधीन वाद में दिये गये निर्णय व डिक्री से अपी. बाध्य होगा, क्योंकि दौराने वाद लम्बन अपी. को अनाधिकृत व्यक्ति से विवादित आराजी को क्रय करने के इकरारनामे किये हैं । अधीनस्थ न्यायालय का निर्णय ए.आई.आर. 1959 सुप्रीम कोर्ट पेज 960 प ए.आई.आर. 1960 राजस्थान पेज 196 में प्रतिपादित सिद्धान्तों के अनुसार पारित किया गया हैं । अपीलाधीन डिक्री व निर्णय पूर्ण रूप से वैद्य व विधि सम्मत हैं । इस निर्णय व डिक्री में हस्तक्षेप करने का कोई कानून सम्मत आधार अपी. प्रदर्शित नहीं कर सका हैं । परिणाम स्वरूप अधीनस्थ न्यायालय का निर्णय वैद्य ठहराते हुए अपीलांट की अपील निरस्त की जाती हैं । अधीनस्थ न्यायालय की पत्रावली बाद तकमील पुन: भेजी जाए । नियमानुसार डिक्री पर्चा जारी हो ।"

Thus, it appears that on the basis of these two documents, tendered in evidence before the trial Court by defendant No.2 Sukhdev Singh, the plaintiff was well aware of the fact that the land in dispute infact came in possession of defendant No.2. There is yet one more document available on record i.e. Ex.A/8. This is the record of right of Samvat

Year 2057 to 2060 corresponding to the year 200 to 2003. In this document description of the suit land is available, which is in the name of appellant. On the basis of judgment and decree awarded by the Revenue Court in favour of the appellant-defendant, possession was also given by the tehsildar on 25.04.1997. The relevant document is Ex.A/11 in this regard. Defendant No.2 Sukhdev singh has tendered the documents referred to hereinabove in evidence and in his statement he has proved these documents.

The contention of the learned counsel for the respondent has been that since neither copy of the Will nor original Will has been produced in the Court, therefore, there is no case as far as defendant No.2-appellant is concerned. I do not find any merit in the contention of the learned counsel. It is always required of plaintiff to prove his case. The case of plaintiff is that he purchased the agricultural land from defendant Gurdev Kaur. His further case is that he was put in

possession also. His statement made in the plaint and recorded before the Court coupled with the documents referred to hereinabove would go to show that he was well aware of the proceedings, which took place in the Revenue Court. He is also aware of the fact that defendant No.2 was put in possession of the suit land long back in the year 1997. It is not in dispute that Smt. Gurdev Kuar has not challenged the findings recorded in Revenue suit, which has been decreed in favour of defendant-appellant. Thus, as far as this suit is concerned, it has become final. The plaintiff-respondent filed the appeal againt Ex.A/1 and that was dismissed in the year 1998. It is also pertinent to mention here that since from very beginning the plaintiff was in the knowledge that the land in dispute infact on account of a Will came in possession with the appellant-defendant but all those facts were not narrated in the plaint.

In view of the above referred documents and in view of the fact that Ex.A/2 has not been challenged by Mst. Gurdev Kaur any further, therefore this judgment and decree awarded in the year 1997 declaring the tenancy rights in favour of appellant-defendant No.2 makes it clear that Gurdev Kaur, who was made defendant in the present suit for specific performance was well aware of the Will and her power of attorney holder, who is said to be her nephew, was also well aware of all litigation and when plaintiff had chosen to purchase the agricultural land then he cannot blame others. Ex.A/2, Ex.A/8 and Ex.A/11 are the documents, which speak about the tenancy rights available in favour of the appellant. When a revenue suit regarding declaration of tenancy rights was filed against Gurdev Kaur, she did not contest and when the judgment was delivered, she did not challenge the same, then it can very well be concluded that in the light of various decisions, certified copies of which have been filed, it appears that defendant No.1

had no tenancy right at the time when Ex.A/1 the sale deed was executed. It shall also be relevant to refer here one more document Ex.A/18, which is a judgment delivered by learned Addl. Munsif Magistrate No.2, Hanumangar in a civil suit filed by Smt. Gurdev Kaur, defendant respondent and Gurdwara Namdhari Bheni Sahab and other persons including Sukhdev Singh, the present appellant for cancellation of Will. In this case 6 issues were framed. Issue No.3 & 5 were relevant. Issue No.3 was regarding limitation and Issue No.5 was as to whether in view litigation pending in many courts whether the suit was liable to be stayed? It further appears that this suit was filed in the year 1993. The Court recorded its findings regarding Issue No.3 that the suit was barred by limitation. The Court also recorded finding on Issue No.5 that in view of litigation pending in other courts, the matter was required to be stayed. Nothing has been brought on record to show that this judgment-

dated 03.06.1994 has been challenged any further or not. Be as it may, but this thing is absolutely certain that respondent Gurdev Kaur was well aware of the fact that there was Will in favour of defendant-appellant, who filed the suit and the Will of 1979 was made by the husband of defendant No.1 in favour of appellant as well as defendant Gurdev Kaur, so in the above facts and circumstances it was necessary for her to have disclosed the facts in the written statement but it appears that defendant No.1 Smt. Gurdev Kaur has not even filed a written statement in this case.

In view of above discussion, the answer to point No.1 & 2 is that document Ex.1 is not admissible in evidence even for collateral purposes and further Mst. Gurdev Kaur had no tenancy right in the suit land as the land in dispute was in the tenancy of defendant No.2, the appellant. Consequently, the answer to point No.2 is that plaintiff is not entitled to a decree for specific

performance of contract and the appeal filed by the defendant No.2 is required to be accepted. However, the plaintiff-respondent, who has paid the consideration amount for the suit land to defendant No.1, is entitled to get refund of the amount with interest @6% per annum from the date of filing of the suit till realization and that answers the point No.3.

In the result, the appeal is accepted and the judgment and decree dated 27.08.2003 is set aside allowing the alternative prayer made by the plaintiff in the suit regarding refund of the payment made to defendant No.1. The defendant No.1 shall refund the amount so received alongwith interest @6% per annum to defendant No.2 from the date of filing of the suit till payment. Decree be prepared accordingly.

(SATYA PRAKASH PATHAK)J.

/jpa